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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1412

ANTHONY MICHAEL GROSSO, JOSEPH CARMEN GROSSO, JR., SAMUEL JAMES GROSSO, PHILOMENA VIOLA, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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ANTHONY MICHAEL GROSSO, JOSEPH CARMEN GROSSO, JR., SAMUEL JAMES GROSSO, PHILOMENA VIOLA, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on February 19, 1974.

CITATIONS TO OPINIONS BELOW

The district court's memorandum and order denying motion for new trial is not yet reported and is reprinted in Appendix A, infra. The order of the Court of Appeals is not yet reported and is reprinted in Appendix B hereto, infra.

JURISDICTION

The judgment of the Court of Appeals was entered February 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U.S.C. 1955 and require that the conspiracy convictions be reversed.

2. Whether the identification procedures followed by the Department of Justice in this case were sufficient to comply with Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 and whether the evidence obtained by wiretap should have been suppressed.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix C, infra.

STATEMENT OF THE CASE

On March 29, 1972 the petitioners here and certain other persons were indicted for conspiracy to violate 18 U.S.C. 1955 and for a substantive violation of 18 U.S.C. 1955. This two count indictment was based upon a series of court-authorized wire interceptions of telephones subscribed to by various defendants.

After extensive suppression hearings certain wiretap evidence was suppressed by reason of the government's failure to follow the proper authorization procedure required by the statute. Although Will Wilson was improperly identified in the applications for authorizations the district court did not consider misidentification alone a sufficient cause for suppression and thus permitted a substantial portion of the evidence to be admitted. On May 11, 1973 the jury returned a verdict of guilty against all defendants on all counts.

On June 26, 1973 the following sentences were imposed: Anthony Michael Grosso was sentenced to five years imprisonment on each count, the sentences to run consecutively; he was also fined ten thousand dollars on the first count and fifteen thousand dollars on the second count. Samuel James Grosso was sentenced to three years on count one and five years on count two, the terms to run consecutively; he was fined ten thousand dollars on Count One and fifteen thousand dollars on Count Two. Joseph Carmen Grosso was sentenced to three years on each count, the sentences to run concurrently; he was also fined five thousand dollars on Count One and ten thousand dollars on Count Two. Philomena Viola was fined five thousand dollars on Count One and her sentence was suspended. All of the fines, with the exception of Mrs. Viola's were committed. Anthony Grosso was denied bail pending appeal and the other petitioners are admitted to bail pending appeal.

REASONS FOR GRANTING THE WRIT

1. Whether it is improper, as here, to prosecute and punish the Petitioners under 18 U.S.C. 371 and 18 U.S.C. 1955 in light of "Wharton's Rule" is a question of which review is being sought without opposition in this Court. In *Iannelli, et al. v. United States,* No. 73-64 the identical question was raised in a petition for certiorari and in a reply memorandum in behalf of the United States the Solicitor General conceded that there was a conflict in the Circuits and that the issue was significant and thus did not oppose a grant of certiorari.

The instant case points out perhaps even more graphically the significance of the problem agreed to by the Solicitor General. In this case two of the four defendants had lengthy prison sentences duplicated by reason of the conviction for the conspiracy and the substantive offense; their fines were multiplied as well.

Since counsel for the petitioners here is also counsel for the petitioners in *Iannelli, supra.,* a repetition of the argument made in *Iannelli* might seem unnecessary, however, it places the position of the Solicitor General in better perspective. In our petition in Iannelli we stated:

"Petitioners contend here, as they did in the district court and in the circuit court, that the conspiracy merged with the substantive count under the doctrine commonly known as Wharton's Rule. The Rule states:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its

commission." *Anderson, 1 Wharton's Criminal Law and Procedure,* Sec. 89, P. 191 (1957).

The courts which have recently had occasion to rule on this issue, in the context of a 1955 prosecution, have taken conflicting views. We urge this Court to resolve the conflict.

The Circuit Court, in this case, citing *U.S. v. Becker,* 461 F. 2d 230 (2d Cir. 1972), held that Wharton's Rule was inapplicable. An exception to Wharton's Rule, known as the "third person" exception, is the basis of the *Becker* opinion. This exception limits Wharton's Rule to those cases where the essential participants are the only conspirators. Accordingly when "third persons" are added all may be convicted of conspiracy. Thus, in *Becker,* as in the instant case, the court held Wharton's Rule inapplicable because more than five persons were charged with commission of the substantive offense, 18 U.S.C. 1955.

Two District Courts taking an opposing view are Ohio and Florida. See *U.S. v. Greenberg,* 334 F. Supp. 1092 (N.D. Ohio 1971) and *U. S. v. Figueredo,* 350 F. Supp. 1031 (M.D. Fla. 1972) *Notice of Appeal Filed,* December 9, 1972. (As of this date argument has not yet been scheduled) The Court in *Figueredo* found the reasoning in *Becker* to be erroneous and declined to follow it.

In *Figueredo,* the court analyzed the cases relied upon by *Becker* and concluded that while those cases were examples of the third party exception, *Becker* was not. The exception only applies when the third party cannot be convicted of the substantive offense. An example cited in *Figueredo* is *State v. Clemson,* 123 Iowa

524, 99 N. W. 139. There, when a third person conspired with a man and a woman for the commission of adultery by the latter two, all three were properly convicted of conspiracy. However, in the instant case, the "extra defendants" (a total of thirteen defendants were indicted) could be found guilty of the substantive charge, unlike the adultery "matchmaker" in the *Clemson* case.

Becker thus rests upon a mistaken interpretation of the third party exception. *Becker* implies ". . . that the mere number charged in the indictment takes on a talismanic quality which obviates the application of the Rule. It is not, however, the mere number charged, but rather the nature of the 'extra' defendants, which determines the result in the individual case." *U. S. v. Figueredo, Supra,* at 1035.

Moreover, under *Becker,* Wharton's Rule may be neatly sidestepped by the prosecutorial expediency of charging more than five persons with both the substantive crime and the conspiracy to violate it. *U. S. v. Figueredo, Supra,* at 1034.

In the circuit, the Government argued that Wharton's Rule was inapplicable because the "five or more persons" requirement of Section 1955 is merely a jurisdictional requirement and is therefore logically no part of the crime itself. The same argument was advanced by the Government, and rejected, in the *Figueredo* case:

> "But the element of proof in the Government's case would be that five or more persons were involved in the gambling business. Thus, group activity is a necessary element of the offense. The Government admits that this is not a crime for which a 'sole proprietor' of a local bookie operation could be

found guilty. This court realizes that the five-person requirement was placed in the statute to bring the activity within federal cognizance. Once put in the statute, however, this 'jurisdictional' element makes the crime one of group activity. A group conspiracy is a logical and necessary prerequisite to commission of the substantive offense by any one of the defendants. To then charge the same group with conspiracy is the result to which Wharton's Rule directs itself." Id. at 1036.

The Government also contended that even if Wharton's Rule was applicable, the only relief to which petitioners were entitled was invocation of the merger doctrine at the time of sentencing. However, where Wharton's Rule is applicable, conspiracy cannot in the first instance be charged and when charged it must be dismissed. *U. S. v. Figueredo, Supra.*

The Government's final argument was that Wharton's Rule should be rejected as archaic. However, the rule is viable today because it continues to serve an important function. When conspiracy is an inherent element of the substantive offense, it should not be made an additional crime. To do so would be grossly improper.

The Court, in *U. S. v. Figueredo, Supra,* at 1033, reflected upon the importance of Wharton's Rule:

"Conspiracy is a crime with common law roots and with an unpopular background. See Sayre, *Criminal Conspiracy,* 35 *Harv. L. Rev.* 393. Justice Jackson once commented upon the concept of conspiracy as a separate crime:

'The looseness and pliability of the doctrine present inherent dangers which should be in

> the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case. *Krulewitch v. U. S.*, 336 U. S. 440, 449 (1949) (Jackson, J. concurring).'
>
> "The Supreme Court has indicated that it will view with disfavor attempts to broaden the scope of conspiracy prosecutions. *Grunewald v. U. S.*, 391 (1957). When seen in this context, Wharton's Rule presents itself as a logical limitation on the use of conspiracy charges by prosecutors."

The question presented is important because of the frequency with which the Government joins counts of conspiracy and 1955 in the same indictment. We, therefore, respectfully urge this Court to resolve the conflict which presently exists in the lower courts, and to ultimately decide that Wharton's Rule requires that petitioners' conspiracy convictions be reversed."

In response to our petition in Iannelli the Solicitor General concluded:

"We recognize, however that the opinion below is inconsistent with the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Hunter,* petition for certiorari pending, No. 73-101.[6] The court in *Hunter* refused to follow the decision in *United States v. Becker,* 461 F. 2d 231 (C.A. 2), which held Wharton's rule inapplicable to a violation of 18 U.S.C.

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6. The government's request for an extension of time to cross-petition on this issue in *Hunter* was denied by Mr. Justice Rehnquist on July 9, 1973.

1955 involving more than five persons.[7] Because of the conflict in the circuits and the significance of this issue to the interpretation of 18 U.S.C. 1955, we do not oppose the granting of a writ of certiorari in this case.

The Court may wish to defer disposition of this petition until after the decisions in *United States v. Giordano, supra,* and *United States v. Chavez, supra.* Alternatively, we suggest the Court may wish to grant the petition now, with the understanding that the parties will brief and argue the issue of the applicability of Wharton's rule only, reserving the issue concerning the authorization of the interceptions to be controlled by the decisions in *Giordano* and *Chavez.*

Respectfully submitted,

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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7. As already noted, *United States v. Bobo* (C.A. 4), *supra* petition for certiorari pending *sub nom. Gray v. United States,* No. 73-231, is in accord with *Becker* and the decision below. Two district court cases in other circuits reached the same result as the court in *Hunter.* See *United States v. Figueredo,* 350 F. Supp. 1031 (M.D. Fla.), notice of appeal filed December 9, 1972; *United States v. Greenberg,* 334 F. Supp. 1092 (N.D. Ohio)."

Conclusion.

The sound policy reasons which caused the Solicitor General to refrain from opposing the grant of a writ of certiorari in *Iannelli, supra.*, are even more vividly demonstrated by the facts of this case by reason of the harsh duplication of prison terms and fines.

2. The second question presented by this petition is identical in all respects to the issue before this Court in *United States v. Chavez,* No. 72-1319, certiorari granted May 21, 1973, argued January 8, 1974 and as yet undecided by this Court. The issue is raised here only to preserve its disposition in accordance with the ultimate decision of the Court in *Chavez, supra.*

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first question raised by the petition because of the conflict in the Circuits and the significance of the problem as previously acknowledged by the Solicitor General in *Iannelli, supra.*

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. ANTHONY MICHAEL GROSSO, JOSEPH CARMEN GROSSO, JR., SAMUEL JAMES GROSSO, PHILOMENA VIOLA	No. 72-102 Criminal

Memorandum and Order Denying Motion for New Trial

The above four defendants have each been found guilty on two counts in connection with a large-scale gambling operation carried on in violation of the laws of Pennsylvania. The first count charged conspiracy and the second count charged a violation of 18 U.S.C. 1955 in actually carrying on an illegal gambling operation.

---

1. *"Prohibition of illegal gambling businesses.*

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and

Appendix A.

The convictions depend in part upon evidence obtained through interception of telephone calls (or wire taps) which were authorized under Title III of the act covering such interceptions. 18 U.S.C. 2510, et seq. There was a large mass of evidence which clearly indicated beyond a reasonable doubt that these defendants for upwards of ten years had been engaged in a large-scale numbers operation providing for bets and payoffs upon the basis of numbers obtained through the daily transactions of the New York Stock Exchange and also other numbers based upon the results at certain race tracks. The conspiracy according to the evidence involved thousands of people and had been in substantially continuous operation during this period of time and had a gross revenue in excess of the minimum amount of $2,000 per day demanded by the statute. In fact, the evidence indicated that the gross revenues of this operation amounted to more than $30,000,000 per year.

The defendants have filed motions for new trial based upon the following points:

(1) 18 U.S.C. 1955 is unconstitutional. The Court

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

of Appeals for this Circuit has held to the contrary. U.S. v. Ceraso 467 F 2d 653 (3d cir 1972).

(2) The wire tap provisions contained in 18 U.S.C. 2510, et seq are unconstitutional. Again, this matter has been decided adversely to the defendants by our Court of Appeals, U.S. v. Cafaro, 473 F 2d 489 (3d cir 1973).

Other complaints made by the defendants have been answered adversely to them by the Court of Appeals in U.S. v. Iannelli, 72-1703 (3d cir slip opinion, May 4, 1973).

(3) Failure to suppress the evidence obtained by the wire taps. The court has previously filed a lengthy opinion in connection with its decision on the motion to suppress dated April 17, 1973. We need not repeat here what was said in that opinion but for our present purposes it is sufficient to state that those portions of the wire taps were suppressed where there was no designation of the person signing the authorization by the Attorney General as required by statute. The wire taps, however, were sustained where approved by the Attorney General Mitchell by initialling memoranda for this purpose.

In other words, no tainted evidence obtained by wire taps was used. The interception act 18 U.S.C. 2118 (10) provides for the suppression of any unlawfully intercepted wire or oral communication "or evidence derived therefrom". It was, however, the later wire taps which were suppressed and the earlier ones were used in this case and therefore the first communications could not possibly have been tainted by the later interceptions which the court held improper.

(4) Jury selection. The jury was selected in this case in the usual manner employed in the Western District of Pennsylvania, that is, the court itself presides over the selection process and propounds certain standard questions to the entire panel.[2] If a juror has an affirmative answer or anything to say in response to one of these questions, he or she raises his hand and states his response. The court may or may not, depending upon the response, query the proposed juror further. Further questions as suggested by counsel (in this case there were several) and approved by the court were also propounded to the jury panel and their answers noted. As to jurors who stated that they knew or had heard about the case, they were then questioned further as to how they knew the defendant and what they knew or had heard and asked if any of this would prevent them from bringing in a fair and impartial verdict under the evidence in this case and the charge as given by the court. The jurors were also questioned individually as to their occupations, former occupations, and occupations and names of employers of spouses. Several challenges for cause made by the defendant were al-

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2. "The defendant in the case is..... Do you know him?

Do you know anything about this case?

The lawyers in this case are ..... from ..... (firm names).

Do you know these lawyers? Have they or their firms ever represented you or any members of your immediate family?

Are you or any members of your immediate family employed by the Federal government (with exception of military service)? What do they do? Are you or any members of your immediate family employed by any law enforcement agency?

lowed. Additional peremptory challenges were allowed. (See Rule 24(b) F.R.Cr.P.)

The result of this process was, in the opinion of the court, the selection of a fair and impartial jury and certainly this method of selecting jurors by the court is entirely proper and the use of it is not an abuse of discretion.

Rule 24(a) of the Federal Rules of Criminal Procedure provides:

> "Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

It is believed that the procedure followed by the court in the instant case was in compliance with U.S. v. Napoleone, 349 F2d 350 (3d cir 1965), where the court interrogated the jury but it was held that the judge should have permitted additional questions to be submitted to it to be asked on voir dire. In U.S. v. Rabb, 394 F 2d 230 (3d cir 1968), our court of appeals held "there is no error in the conduct of the voir dire by the court provided that the attorneys are permitted to submit additional written questions to the trial judge so that they can be submitted to the prospective jurors if determined proper by the trial judge". In the instant

case, all questions proposed by attorneys for defendants were allowed except one which the court ruled improper. The case in the opinion of the court did not appear to be one where separate interrogation of prospective jurors out of the hearing of the others was mandated.

The defendants in their brief have pointed to no specific interference with their rights to a complete interrogation of the jury to determine if there was any bias or prior knowledge on the part of the jurors which would undermine with their impartiality and fairness. Rather, defendants' argument appears to be a frontal attack upon selection of criminal juries through voir dire by the court. The Western District of Pennsylvania has always adhered to the method specifically permitted under the Rules of Criminal Procedure and has kept jury selection and voir dire in the hands of the judge. Where counsel are freely permitted to submit additional questions to be propounded, it would seem that there is nothing unfair in this method which would deprive the defendants of their right to a fair trial. Defendants do not in their brief point out specifically what prior additional questions they were prevented from asking or what particular juror or jurors should not have sat. We therefore hold that this method of selecting the jury was entirely proper.

(5) Use of 1965 statement of Anthony Grosso in Maloney case. In the case of U.S. v. Maloney, a police officer, heard in this court in 1965, defendant Anthony Grosso testified that in the years between 1958-1963 he was engaged in the numbers business in the Pittsburgh, Pennsylvania area and employed between 3,000 and 5,000 employees and grossed approximately $13,-

000,000 per year. The government offered this in evidence in the instant case as an admission against interest and the court permitted it to be read to the jury with cautionary instructions that this testimony of Anthony Grosso was not to be considered by the jury as evidence against the other two Grosso defendants and the defendant Viola, i.e., to their participation in the gambling conspiracy and operation of the gambling business; that the jury would have to wait and see if there was other evidence. The jury was also cautioned that the testimony as to size of the business and the number of employees in 1963 was not evidence as to its size and revenues in 1970 or 1971 after the effective date of the act under which the defendants were charged but that the only purpose of receiving this testimony was to show how long the gambling conspiracy had been operating and to show the inception of it. None of the statements in the Anthony Grosso testimony implicated the other defendants and thus we do not have a question arising under Bruton v. U.S., 391 US 123, 88 S Ct 1620, 20 L ed 2d 476 (1968).

The indictment in this case charged that the conspiracy had existed from the year 1960 to 1971. Although the evidence referred to a period before the effective date of the act, viz: October 15 1970, such testimony was admissible to show the intent and purpose of later acts in the conspiracy. U.S. v. Russo, 442 F 2d 498 (2d cir 1971).

As a matter of fact, there was ample evidence following this in the case of the existence of this conspiracy from 1960 on into 1971 that there were more than five employees and more than $2,000 per day revenues

and there was ample evidence in the testimony of other witnesses to say nothing of the wire taps themselves of the fact that Anthony Grosso was the head of this conspiracy over all these years and the other defendants active participants in it. Therefore, any evidence in admitting this testimony is harmless in the extreme since there was overwhelming other proof of the defendants' guilt.

(6) Refusal to allow defendants to examine the grand jury minutes after the granting of the motion to suppress in part and denial of the same in part. The defendants claimed that they were entitled to examine the grand jury minutes to determine if illegally obtained evidence or the fruits thereof were disclosed to the grand jury.

Ordinarily, defendants are not entitled to examination of the entire grand jury minutes and the matter of such disclosure is discretionary with the court. Grand jury minutes of the testimony of particular witnesses in this case was disclosed under Rule 16 and as provided in the Jencks Act, 18 U.S.C. 3500, when a witness who had testified before the grand jury testified in court.

The purpose for which defendants sought to examine the grand jury minutes was to see if testimony from the suppressed wire taps was used before the grand jury but this is not a proper purpose since it would make no difference whether such testimony was used or not. As previously pointed out, the earlier wire taps were good. It was only the later wire taps that were bad and nothing in the first wire taps could possible be construed as fruit of the poisonous tree emanating from the second wire taps.

It is clear that the validity of an indictment cannot be attacked by showing it was based in part on incompetent evidence. Lawn v. U.S., 335 US 339 (1957); Costello v. U.S., 350 US 359. In U.S. v. Kenny 462 F 2d 1205 (3d cir 1972), the court also stated: "But a defendant may not challenge an indictment on the ground that illegally obtained evidence was presented to the grand jury."

For the above reasons, defendants' motions for new trial will be denied.

Order

AND NOW, to wit, June 21, 1973, upon consideration of defendants' motions for new trial and judgment of acquittal and upon consideration of the briefs of counsel,

IT IS ORDERED that said motions be and the same hereby are denied. The defendants are directed to appear for sentence on *Monday June 25, 1973, at 10:30 a.m.*

United States District Judge

CC:
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633 U.S. Courthouse 15219

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1549, 73-1655,
73-1656 and 73-1657

UNITED STATES OF AMERICA

v.

Anthony Michael Grosso
Joseph Carmen Grosso, Jr.
Samuel James Grosso
Margaret Ruth Petraglia
Frank Anthony Puleo
Nellie Mary Puleo
Philomena Viola

ANTHONY MICHAEL GROSSO, Appellant in No. 73-1549
JOSEPH CARMEN GROSSO, JR., Appellant in No. 73-1655
SAMUEL JAMES GROSSO, Appellant in No. 73-1656
PHILOMENA VIOLA, Appellant in No. 73-1657

(D. C. Criminal No. 72-102)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) February 14, 1974
Before VAN DUSEN and ADAMS, *Circuit Judges,*
and NEALON, *District Judge*

James E. McLaughlin, Esq., Pittsburgh, Pa.
David O'Hanesian, Esq., Pittsburgh, Pa.
Attorneys for Appellants

Richard L. Thornburgh, United States Attorney; Kathleen Kelly Curtin, Assistant United States Attorney; Pittsburgh, Pa.
and
Kenneth A. Bravo, Special Attorney, Department of Justice, Organized Crime and Racketeering Section, Philadelphia, Pa.
Attorneys for Appellee

Judgment Order

After considering the contentions raised by defendants-appellants that (1) the failure to properly identify the person who actually authorized the wire interception requires suppression;[1] (2) the application of Wharton's Rule requires a reversal of the conspiracy convictions;[2] (3) 18 U. S. C. § 1955 is unconstitutional;[3] and (4) the introduction of Anthony Grosso's testimony in a prior unrelated trial was improper;[4] it is

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1. See *United States v. Ceraso,* 467 F. 2d 647, 649-52 (3d Cir. 1972).

2. See *United States v. Iannelli,* 477 F. 2d 999, 1002 (3d Cir. 1973)

3. See *United States v. Ceraso,* 467 F. 2d 653, 657-58 (3d Cir. 1972).

4. See 69A, 73A-74A, 113A; *United States v. Lipowitz,* 407 F. 2d 597, 602-03 (3d Cir. 1969); *United States v. Grosso, et al.,* Memorandum Sur Motion For New Trial dated June 21, 1973, 149A at 155A-157A (W. D. Pa., Criminal No. 72-102).

ADJUDGED AND ORDERED that the June 26, 1973, judgment of the district court be and hereby is affirmed.

BY THE COURT:

VAN DUSEN
Circuit Judge

ATTEST:

THOMAS F. QUINN
Clerk

Dated: Feb. 19, 1974

Certified as a true copy and issued in lieu of a formal mandate on March 13, 1974.

THOMAS F. QUINN

Test:

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

Statutes Involved

18 U.S.C. 2516 provide, in pertinent part:

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> * * * * * * * *
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> * * * * * * * *
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> * * * * * * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * * * * *

18 U.S.C. provides, in pertinent part:

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1412

ANTHONY MICHAEL GROSSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the validity of a court ordered wire interception on the ground that proper procedures were not followed within the Department of Justice for authorizing the submission to the court of the application for the wire interception order. They also contend that their conviction and punishment for violation of both 18 U.S.C. 371 and 1955 was improper.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiring with numerous others to conduct an illegal gambling business in violation of 18 U.S.C. 371 (count 1), and of conducting such a business in violation of 18 U.S.C. 1955 (count 2).[1] Anthony

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[1]Three other persons named in the indictment were severed. Over forty persons were named as conspirators but were not defendants.

Michael Grosso was sentenced to consecutive terms of five years' imprisonment on each count and fined $25,000. Samuel James Grosso was sentenced to consecutive terms of three years' imprisonment on count 1 and five years' imprisonment on count 2 and fined $25,000. Joseph Carmen Grosso was sentenced to concurrent three-year terms of imprisonment on each count and fined $5,000 on count 1 and $10,000 on count 2. Philomena Viola was given a suspended sentence on counts 1 and 2, and placed on probation for three years and fined $5,000 on count 1. Each petitioner was also fined his proportionate share of the costs of prosecution. The court of appeals affirmed (Pet. App. 20-22).

The evidence at trial, which depended in part upon evidence obtained by court authorized electronic interceptions, showed that petitioners conspired to and did violate 18 U.S.C. 1955 by engaging in a large-scale gambling operation that was illegal under state law.[2] They provided bets and payoffs based on numbers obtained through the daily transactions of the New York Stock Exchange as well as other numbers based upon race track results. The operation had been in substantially continuous operation for years, with a gross revenue well in excess of the statutory minimum of $2,000 per day (Pet. App. 12).

1. Prior to trial, petitioners moved to suppress evidence obtained from court ordered electronic surveillance on the ground that the applications for the orders were not properly authorized within the Department of Justice in accordance with 18 U.S.C.

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[2]Sections 4601 and 4607, Title 18, Purdon's Penna. Stats. Ann.

2516(1) and 2518(1) (Pet. App. 23-24). The district court granted petitioners' motion with respect to one surveillance because the application for the surveillance, and for a subsequent extension, had not been authorized either by the Attorney General or by any Assistant Attorney General specially designated by the Attorney General (Pet. App. 13). Petitioners contend that the district court erred in failing to suppress evidence received from an earlier surveillance, the application for which was personally authorized by the Attorney General under the Department of Justice's procedure as set forth in the briefs for the United States in *United States* v. *Giordano*, No. 72-1057, and *United States* v. *Chavez*, No. 72-1319, both decided May 13, 1974.

The government here showed by affidavits and answers to interrogatories that the application in question was personally authorized by Attorney General John N. Mitchell, who initialed the authorization memorandum. A letter was then dispatched to the attorney in the field notifying him that he was authorized to apply for the interception order; it erroneously indicated that Assistant Attorney General Will Wilson had authorized the application. This Court held in *United States* v. *Chavez, supra,* that such an error does not warrant suppression of the evidence obtained from the interception.

2. Petitioners also argue that 18 U.S.C. 371 and 18 U.S.C. 1955 do not charge different offenses, and therefore, under "Wharton's rule", it was improper to prosecute and punish them for both the conspiracy and the substantive offenses.[3] As petitioners point out, this

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[3]Since petitioner Viola's sentence on count 2 was suspended, it is not clear that she has been prejudiced by the court's refusal to apply Wharton's rule to her case.

issue is presented in a similar factual situation in *Iannelli* v. *United States,* No. 73-64, certiorari granted, May 28, 1974. Accordingly, it would be appropriate to defer disposition of this petition until after the decision in *Iannelli*, and then to dispose of it in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

DOJ-1974-06